UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:	)	
	)	
SUTTER HEALTH CENTRAL VALLEY REGION, d/b/a SUTTER TRACY COMMUNITY HOSPITAL,	)	
	)	Case 32-CA-098549
Respondent,	)	
	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU),	)	
	)	
Charging Party.	)	
	)	

CHARGING PARTY CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Charging Party (the Union) herewith files its Answering Brief to Respondent's Exceptions to the Administrative Law Judges Decision ("ALJD"). Contrary to Respondent's assertions, the Administrative Law Judge (the "ALJ" or "Judge") correctly applied Board law to the facts in evidence in an extremely well-reasoned decision. The Board should affirm the rulings, credibility determinations, findings, conclusions of law and remedial order in the ALJD; and to the extent it may find it needs to reach the issue of single subject impasse, based on Respondent's exceptions, find that the parties were not at a good faith impasse when Respondent made its unilateral changes to health and wellness benefits.

The Complaint alleges that Respondent violated Section 8(a)(5) of the National Labor Relations Act (the Act) by commencing open enrollment for the Sutter Central Valley Region Self-Funded Health Plan (the "New Plan") and replacing its Sutter Select Medical Plan (the "Existing Plan") with the New Plan, without affording the Union adequate notice and a meaningful opportunity to bargain; and/or without bargaining to a good faith impasse on this subject. The evidence at hearing supported these allegations, and the Judge correctly found violations of the Act as alleged.

This case involves an initial bargaining situation. Respondent and the Union had been bargaining for over three months before Respondent ever indicated to the Union that health and wellness subjects were reviewed by Respondent on an annual basis, which required bargaining on a heightened timeframe. Respondent chose not to mention this to the Union until it sent letters on September 19 (regarding wellness) and September 21 (regarding health plans).

During the months leading up to Respondent finally informing the Union it reviewed

health and wellness benefits annually, and that it would need to reach agreement in just over a month on these subjects, the parties had been bargaining non-economic subjects, before the bargaining game changer raised by Respondent. Nevertheless, despite the extremely short notice provided by Respondent, the Union expeditiously obtained input from its members and attempted to learn more about Respondent's proposals on these subjects, notwithstanding Respondent's assertions to the contrary in its exceptions. On October 25, the Union provided a comprehensive counterproposal that accepted Respondent's overall healthcare proposal framework, just over a month after receiving Respondent's "notice" of the heightened timeframe for bargaining health and wellness. The Union came in with a proposal that normally would have been achieved after many months of bargaining regarding economic subjects and in no manner indicated that it would not move from its proposal – an extremely realistic proposal accepting Respondent's overall framework, and the Union never indicating it had no room to move further. Respondent, however, was going to have things its way, and its way only. Despite the objections to the Union's proposal presented to the Board now in Respondent's Exceptions and Brief in support thereof, it did not raise them with the Union at the table. It simply did not have any response to the Union's proposal after the Union negotiator walked through it; and instead informed the Union that very day it presented the proposal, and by letter the following day, that it would implement its health and wellness proposals.

Respondent's proposals on these subjects proved nothing more than a fait accompli as the Judge correctly found, and its implementation without adequate notice or a meaningful opportunity to bargain violated Section 8(a)(5) of the Act. As the Judge correctly found, Respondent's decision that it would maintain uniform benefits for union and non-union employees was set in stone, and nothing the Union could offer would alter that. It has not been

alleged that such a proposal was unlawful as Respondent's Brief in support of its Exceptions seems to suggest; rather it is evidence that Respondent was dead set on having things as it wanted, only, and that its bargaining over this subject was indeed presented as a fait accompli. Again, Respondent failed even to ask questions and failed to make a counterproposal after the Union's proposal was made, just 15 days after Respondent brought its health benefits experts in to answer questions by the Union and nurses about how the proposed changes would compare to the existing plan.

Respondent's exceptions also raise whether the parties should be required to have reached an impasse on health and wellness benefits, excepting to the Judge's failure to reach the issue. Clearly the parties were not at impasse as will be set forth below. The Board should find impasse is required under these circumstances and the parties were not at an impasse based on the record evidence, and that Respondent unlawfully implemented its changes. Irrespective of whether impasse is deemed to be required by the Board on this single issue, the record is clear that Respondent did not provide adequate notice or a meaningful opportunity to bargain before making its unlawful unilateral changes to healthcare benefits.

II. STATEMENT OF FACTS[1]

The Union was certified by the Board on March 23, 2012, as the collective-bargaining representative for a unit of full-time, regular part-time and per diem registered nurses at the Employer's Tracy, California, facilities. Joint Exh. 1. The parties are engaged in first contract negotiations. Tr. 36. Bargaining commenced on June 12, 2012,[2] and as of the commencement of

[1] "Tr. ____" refers to the pages of the transcript of the hearing in this matter. "GC Exh." refers to General Counsel's Exhibits. "R Exh." refers to Respondent's Exhibits. "Joint Exh." Refers to General Counsel's and Respondent's Joint Exhibits.

[2] All dates are in calendar year 2012 unless stated otherwise.

the administrative law trial, the parties had conducted 40-45 bargaining sessions. Tr. 36.

Union Representative Michael Brannan has been the Union's lead negotiator throughout the negotiations. Tr. 37. Respondent's bargaining team has been led throughout negotiations by Respondent's attorney, Christopher Scanlan. Tr. 38. At the June 12 session, Respondent presented its overall proposal. Tr. 39. Respondent did not propose any changes to its existing healthcare benefits at this time and did not indicate that it was planning any changes to healthcare benefits for 2013. Tr. 39. Scanlan admitted he was aware that Respondent reviewed healthcare benefits on an annual basis prior to this first bargaining session (Tr. 245, 280), but Respondent did not inform the Union of such a practice until September 19 (wellness) Joint Exh. 5 and September 21 (health) Joint Exh. 7. Scanlan also admitted that Respondent (not a third party) had control over its healthcare benefits.[3] Tr. 257. Over the next three months the parties continued to bargain, but Respondent did not indicate at any of these sessions that it intended to make changes to healthcare benefits for 2013. Tr. 40. Respondent also knew with certainty prior to August 29 that it was planning to make changes to healthcare benefits. Tr. 313.

After the first bargaining session of June 12, the subject of healthcare benefits was not raised again until the September 19th bargaining session. At this session, Scanlan presented the Union with a letter, signed by Respondent's Human Resources Director Melanie Wallace. Tr. 39. The letter indicated that Respondent intended to make changes for the next calendar year to the Employer's wellness program and outlined certain components of the proposal and its relation to health insurance premiums. Respondent's September 19 letter also stated that Respondent would begin to enroll the bargaining unit RNs in the wellness program at the end of October. Joint Exh. 5. Brannan informed Scanlan that he would review the letter, and the parties continued bargaining other subjects. Tr. 42. On September 20, Union Labor

[3] Both Respondent and Sutter Select are part of Sutter Health. Tr. 287-288.

Representative Marti Smith replied to Respondent's September 19 letter. The Union's letter of September 20 explicitly objected to Respondent's proposed changes to wellness and objected to *any* changes to benefit plans affecting unit employees without bargaining. Joint Exh. 6. Tr. 44.

Respondent, by HR Director Wallace, next sent a letter to the Union, dated September 21, stating that Respondent planned to adopt the New Plan, which included changes to the health, dental, vision and wellness benefits for the next calendar year. Tr. 45. Joint Exh. 7. The letter stated that it was Respondent's "preference" to include the bargaining unit nurses in the changes it wished to implement across the board for all of its employees in these areas, and that it would do so by the November "open enrollment." Joint Exh. 7. Brannan did not respond because the Union's letter of September 20 had already indicated the Union's admonition that any changes to benefit plans should not be implemented unilaterally. Tr. 49. Joint Exh. 6.

Respondent's proposed changes to these healthcare benefit offerings in the New Plan were far reaching. Respondent's proposal included increases in copays, deductibles, hospitalization fees, a $500 copay for utilizing non-Sutter Health facilities, increased pharmaceutical costs and decreased access to specialists in a subsection of the New Plan called the "EPO." Tr. 46-47. Respondent's proposed New Plan also included an "EPO Plus plan," with cost increases for inpatient hospitalization, in addition to a $500 copay, cost increases for emergency room access and premium cost increases for health, dental and vision. Tr. 47. Roughly 90 percent of the bargaining unit had been enrolled in the Existing Plan's EPO Plus; yet, in order to keep their costs commensurate with the Existing Plan EPO Plus, these RNs would be required to downgrade to the EPO of the New Plan, which has a more restrictive provider network. Tr. 47. Respondent also proposed increases in premiums, deductibles, vision, dental and emergency room access in the New Plan's PPO. Tr. 48.

Respondent's proposed New Plan came "out of the blue" and was a "significant change to a benefit" of great importance to the bargaining unit. Tr. 48. Such a game changer with just over a month to bargain before Respondent would implement these changes required the Union to "get up to speed on not only what the proposed changes were, but what the benefits were that were in place" because the Union "had not been focused on economics" up to that point in negotiations and was in a first contract bargaining situation, requiring many components of the contract to be bargained that wouldn't be dealt with in successor bargaining. Tr. 49, 54, 71. Joint Exh. 1.

The parties met again on October 2. Brannan informed Respondent that the Union needed to review wellness information that had been furnished by Respondent upon the Union's request. The Union also accepted Scanlan's offer to have Respondent's benefits representatives and plan administrators come to a session to explain the Respondent's New Plan proposal and obtain additional background on the Existing Plan. Tr. 50.

The next bargaining session was held on October 10, and Respondent's bargaining team included three individuals to discuss the Respondent's health and wellness proposals. Tr. 51. With these three individuals, the parties went over Respondent's proposed changes to healthcare and wellness. Aspects of Respondent's proposal that these three Respondent representatives discussed included: how the wellness plan was administered, RN patient data collection, appeals procedures, among other aspects of the wellness plan. Tr. 51-52. The Union also asked questions concerning existing health benefits and how the proposed changes would impact the RNs. Tr. 52. As Brannan testified, the Union "spent… a fair amount of time . . . with the folks [benefits representatives] they brought in," and then the parties moved onto other subjects before the session concluded. Tr. 52.

On October 19, the parties met again, but at this point the Union was still formulating a counterproposal on health benefits, having only been alerted on September 19 (wellness) and September 21 (health) that Respondent desired to have healthcare benefits in place for the next calendar year, whether or not an overall agreement was reached; so the bargaining session focused primarily on other non-health benefits issues. Tr. 55, Joint Exhs. 5 and 7. During this time period, however, the Union had "a lot to do to get up to speed on [healthcare] on such short notice." Tr. 53. Respondent negotiator Scanlan admitted Brannan informed him at the October 19 session that the Union was still soliciting input from the RNs concerning formulating a healthcare counterproposal. Tr. 289.

The Union discussed the issues with the RNs, asking them questions about Respondent's proposed health and wellness changes. Tr. 53-54. The bargaining team "typically would go through the facility and talk to nurses and have one on one meetings." Tr. 54. Union representative Marti Smith was also having meetings and side meetings with bargaining unit members. Tr. 54. As Brannan testified, it was important for the Union to have the RNs' feedback concerning healthcare benefits, because the Union is a democratic organization, and as this was a first contract, the RNs knew the issues the best concerning their healthcare benefits, as they had experience under the Existing Plan. Tr. 54, 71. The Union had a more difficult time bargaining health benefits due to this being a first contract as opposed to successor contract negotiations. Tr. 71. The Union "needed to make sure" the Union and the RNs "were all on the same page when we. . . made some kind of movement in negotiations, certainly on something as important as" health benefits. Tr. 71.

At this time, the Union had also been awaiting information concerning the summary plan descriptions (SPDs) for 2013. Tr. 55. Respondent had informed the Union that the SPDs for

2013 would be the same as 2012 with four exceptions. Tr. 56. With the information Respondent furnished on October 24, however, Respondent included a chart with copays, deductibles and out of pocket expenses for the proposed 2013 New Plan. Joint Exh. 11. There were, however, differences between some of the copay amounts provided in the September 21 proposed healthcare changes (Joint Exh. 7) and what Respondent furnished on October 24 concerning its healthcare proposal. Tr. 57, 268.

The next bargaining session took place on October 25. Tr. 57. The Union provided its counter to the Employer's proposal on health benefits (medical, dental and vision).[4] Joint Exh. 12. Tr. 57. Brannan testified that the Union "made very clear at this session that [the Union] was willing to negotiate healthcare as a. . . complete side agreement absent the complete contract." Tr. 59. The Union presented a counterproposal that Brannan described as:

> an attempt to respond in the most comprehensive way that we could on what the Employer was proposing and proposing to change. And we responded that we were in agreement with very much of the plan structure that they were proposing. We were in agreement that. . . there could be these three plans, EPO, EPO Plus, PPO. We were in agreement with them that there could be a split between wellness participation and non-wellness participation and that premium rates could be affected by either/or, whether you were in or out of the wellness program. We agreed with the Employer that we could split on the premium costs based on employment status. Part time employees versus full time employees and premium costs would be [sic] different – there would be difference in premium costs between those two categories. So those were basic structural components of the plan that we responded to the Employer and tried to match up. And we could have proposed anything we wanted here. We could have proposed Kaiser benefits. We proposed a plan that we felt was meeting them more than halfway on plan structure and benefit structure and premium costs and things like that. Tr. 59-60.

As Brannan testified, "we made quite significant movement. In considering the short timeframe we were on, this is not where we would normally. . . have started in negotiating over healthcare benefits. And so we felt we were really starting at a place that could get us a

[4] This was achieved in only two weeks and one day after Respondent provided experts to explain its health benefits proposal on October 10.

settlement here on this issue within the timeframe that was before us as the Employer explained it." Tr. 60. This, again, was despite the fact that it was difficult for the Union to generate a comprehensive healthcare benefits counterproposal on such short notice, as "it took some time to get the information to get up to speed on exactly what the benefits were, what the changes were and what that meant, and to get the input from the nurses about where they thought we should go as far as a response." Tr. 60-61.[5]

Respondent asked the Union no questions, however, about its counterproposal. Tr. 62. Respondent expressed concerns about costs, but there is no evidence that Brannan indicated in any manner that the Union would not move on its counterproposal with regard to costs or any aspect of the Union's counter. Tr. 65, 273. Brannan testified that the Union "understood we were under this timeline and were wanting to get where we needed to go. But [the Union] had room to move on this proposal, in terms of premium costs and the components of the wellness program." Tr. 65. Otherwise, the Union had accepted Respondent's proposal structurally. Tr. 65. After the Union provided its counterproposal, Respondent provided the Union with additional information that the Union had not had prior to the session, which outlined "plan costs, total costs of each of the plans split by full time/part time, with wellness, without wellness, employee, employee/spouse, employee/children, employee/family. . . every economic component of the healthcare benefit . . . and the total monthly plan premium, which [the Union] previously didn't have. . . for 2013." Tr. 62-63. This was the first time that Respondent provided such information to the Union. Tr. 63.

Respondent provided no response to the counterproposal during the bargaining session, but after the session ended, Scanlan informed Brannan in the hallway that Respondent "was

[5] Scanlan also acknowledged that Brannan "said something like" the Union was also hampered by not having the rest of Respondent's economic proposals. Tr. 296.

going to go ahead and implement the healthcare and wellness changes," less than 6 weeks after informing the Union it required bargaining over healthcare on an expedited basis.[6] Tr. 66, 280. Joint Exhs. 5, 7. By letter dated October 26, Scanlan put in writing what he had indicated to Brannan at the end of the October 25 bargaining session, notifying the Union that Respondent was implementing its health benefits and wellness proposals. Joint Exh. 14. Tr. 66. The Union was willing to schedule "extra sessions strictly for healthcare bargaining," but as Brannan testified, "management didn't respond to [the Union's] proposal, besides saying they were going to implement." Tr. 108. The Union never told Respondent that its healthcare counterproposal was its final offer. Tr. 272. Respondent negotiator Scanlan also admitted that the Union never stated it had no room to move. Tr. 273. Respondent admitted that it could have implemented its healthcare benefits for other employees but also continue to bargain with the Union with regard to the Union-represented RNs. Tr. 273. As Brannan testified, the Union "would have been bargaining in June, July or August" over healthcare benefits, yet responded "in the best manner that we could on the timeline that was put in place when management gave us notification in late September." Tr. 143.

Union negotiator Brannan testified that he was familiar with the general rule that an employer may not make changes absent an overall agreement or impasse, and that there are some exceptions to that general rule. Tr. 165. As of the date of the hearing in this matter, however, Brannan did not know whether Respondent, in this first contract bargaining situation, adjusted its healthcare benefits on an annual basis. Tr. 165. Brannan, however, agreed to bargain separately over healthcare benefits at Respondent's insistence because "it was clear they were going to

[6] Respondent's negotiator Scanlan was aware that healthcare was such a contentious subject between the Union and another Sutter Health hospital (Sutter Solano), for which Scanlan served as lead negotiator, that this subject contributed to the parties taking from 2011 to March 2013 to reach an agreement. Tr. 280. Here, however, Respondent allowed the Union only 40 days to bargain healthcare benefits. Tr. 284.

implement at some point." To Brannan, "as a negotiator, he felt the Union was better to be "bargaining to reach an agreement than fighting over whether the implementation was legal or not." As he testified, the Union "tried to reach agreement with them," and the Union's "proposal from [October] 25th reflected that." Tr. 166. Indeed, Respondent negotiator Scanlan admitted, after numerous attempts to avoid answering Counsel for the General Counsel's questions, that Brannan did agree to bargain over healthcare separately (Tr. 244-45), and Respondent's bargaining notes reflect this. Resp. Exh. 9. Scanlan also admitted that Brannan never said he would not bargain a separate health benefits agreement for 2013 alone. Tr. 290.

When the parties met on November 7, Scanlan indicated that the changes to the wellness program would need to be delayed so that the bargaining unit would have a three-month window period to enroll. Tr. 68. Brannan agreed to the extension while preserving the Union's right to protest Respondent's implementation of the New Plan. Tr. 8; Joint Exh. 15. Respondent chose, however, not to move back the date for implementation of the New Health Plan. Tr. 288. And as Patty Nelson, Sutter Health's Health and Welfare Benefits Manager, indicated, it is possible for union-represented employees' healthcare benefits to be adjusted later, when a Sutter affiliate and a union reach a contract, months after open enrollment had already occurred. Tr. 324-325.

On November 12, Brannan wrote to Scanlan and reiterated the Union's complete opposition to Respondent's health and wellness implementation. Tr. 69; Joint Exh. 16. Brannan's November 12th letter reviewed the parties' bargaining to date and demanded Respondent cease and desist from implementation and instead sought continued negotiations. Joint Exh. 16. Respondent, however, did not accept the Union's invitation to continue to bargain. Tr. 70.

III. ARGUMENT

A. The Union Was Not Afforded Adequate Notice and a Meaningful Opportunity to Bargain.

Generally, an employer is precluded from unilateral implementation of a bargaining proposal unless the parties have bargained to overall good faith impasse. See, e.g., *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

In *Stone Container*, 313 NLRB 336 (1993), the Board found an exception to the implementation prior to overall impasse doctrine where certain terms and conditions are reviewed and adjusted annually. The *Stone Container* Board concluded that the employer did not violate the Act when it implemented changes concerning wage increases because it "made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal concerning the April wage increase and did not raise the issue again during negotiations." *Brannan Sand and Gravel,* 314 NLRB 282, 282 (1994) (summarizing the Board's conclusions in *Stone Container*). Accordingly, the *Stone Container* Board found the employer did not violate the Act by unilaterally changing its annual wage increase prior to the parties reaching agreement or an overall good faith impasse. *Stone Container*, 313 NLRB at 337.

In *Brannan Sand and Gravel,* the health plan changes at issue, the Board held, were similar to the annual wage increase involved in *Stone Container* because they were reviewed and adjusted annually. Unlike the employer in *Stone Container*, however, the Board in *Brannan* found that the employer "did not satisfy its obligation to provide the union with timely notice and a meaningful opportunity to bargain over the change in employment conditions" as the changes to the health plans were presented to the union as a fait accompli, the employer having already

determined its course of action prior to bargaining with the union over the matter. In *General Die Casters, Inc.,* 359 NLRB No. 7 (2012), the Board, citing *Brannan,* also found the employer did not comply with its duty to give meaningful notice and opportunity to bargain in good faith, regarding layoffs that occurred during the course of contract bargaining, merely informing the union of the changes at a bargaining session, claiming impasse on the issue, and following through the next day with the layoffs.

As in *Brannan* and *General Die Casters*, Respondent did not provide the Union with adequate notice and opportunity for meaningful bargaining concerning health benefit changes. Not until September 19 (wellness) and September 21 (health), over three months into bargaining, did Respondent even inform the Union that it adjusted health benefits on an annual basis or wished to bargain concerning medical benefits with the intent to make any changes for the then-upcoming calendar year, given its preference to make such changes for all employees, bargaining unit and non-unit, at the same time. This is despite the fact that Respondent was, of course, aware that it reviewed and adjusted benefits annually prior to the commencement of bargaining in June, and knew with absolute certainty the record establishes prior to August 29 that it desired changes to health and wellness.

Respondent, however, chose to wait, in order to provide the Union as little time as possible to bargain the major subject of healthcare benefits, never even mentioning to the Union during the preceding months of bargaining that expedited bargaining over healthcare may be required. Not until October 10, did Respondent devote significant time in bargaining over its proposed medical benefits changes, Respondent then bringing in three individuals familiar with Respondent's proposal to describe its details to the Union and answer the Union's questions as to how the proposed changes from the status quo would affect bargaining unit employees.

Until October 10, it would have been impossible for the Union to make an intelligent counterproposal on the subject in the heightened timeframe Respondent had, only just three weeks before, informed the Union that the parties would need to bargain within concerning health benefits. The Union, as Brannan testified, had to seek input from its members about Respondent's proposal and existing benefits in this initial contract situation. And, unlike in *Stone Container,* where the employer was found not to have violated the Act, in part, because the union made no counterproposal, here the Union did timely provide a counterproposal - one which, as discussed above, should have generated the back and forth of good faith bargaining from Respondent, given the Union's acceptance of Respondent's overall healthcare benefits framework. Indeed, given the lack of notice and serious bargaining on the subject of health benefits not beginning in earnest until October 10, it is quite remarkable that the Union was able to provide its counterproposal when it did on October 25. This is especially so when the Union was still receiving information about Respondent's healthcare proposal at the October 25 bargaining session, as well as receiving new information about copays on October 24.

In any event, Respondent asked no questions about the Union's counterproposal on October 25; and at the end of the session Respondent lead negotiator Scanlan instead informed Union lead negotiator Brannan that Respondent would implement its healthcare benefits proposals. Respondent, by Scanlan, followed up this statement by letter the next day, announcing Respondent would implement its proposal, rather than bargain with the Union.

Such a scenario is wholly distinguishable from *St. Mary's Hospital of Blue Springs,* 346 NLRB 776 (2006), in which the Board agreed the employer's changes to its health coverage were not unlawful, given the notice and opportunity to bargain provided to the union and the

employer's willingness to continue to bargain over the substance of this decision at any time during the future course of negotiations. Here, by contrast, as soon as the Union presented its health benefits counterproposal on October 25, Respondent, without any questions or bargaining over the Union's counterproposal, rushed to inform the Union at the end of the October 25 session, and by letter the next day, it would implement its own proposal. Respondent also refused to accept the Union's request, by Brannan's November 12 letter, to continue to bargain over healthcare benefits after Respondent announced implementation.

What is clear is that Respondent was going to do as it saw fit, like the employers in *Brannan* and *General Die Casters,* precluding any opportunity for meaningful bargaining after such point in time, as the decision at this point was a fait accompli, as the Judge correctly determined based on the evidence before him. Indeed, the October 10 presentation by Respondent's experts was merely an information session concerning the details of what was already set in stone, as evidenced by Respondent's announcement of implementation on October 25 and 26 and lack of any good faith back and forth with the Union over the Union's October 25 counterproposal.[7]

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[7] Compare *Saint-Gobain Abrasives*, 343 NLRB 542 (2004) where the parties were truly at the end of their rope with regard to interim health benefits bargaining, found by the Board to have held fixed positions after extensive bargaining on the subject. The employer in *Saint-Gobain* provided adequate notice to the union on August 29 that it required interim bargaining on healthcare benefits before reaching impasse on November 15, allowing 2 and a half months of bargaining on the subject. In the instant case, Respondent announced implementation just over a month after providing notice to the Union of its intent to bargain health and wellness on an expedited basis, even though the Union accepted Respondent's overall framework and displayed no fixed position as the union displayed in *Saint-Gobain Abrasives*. Respondent's contention in its exceptions that the timeframe herein is established as a sufficient period for bargaining in Board law is simply mistaken, as good faith bargaining depends of course on the context. Here, there was very little time for the bargaining over this major subject in first contract bargaining requiring member input as the evidence displays; but in any event, Respondent's actions demonstrated it was going to implement uniform benefits to non-union and Union-represented employees no matter what, given its overall conduct herein and complete non-response to the Union's realistic counter. Respondent could have "bargained" 40 more days and the same outcome would have been true given Respondent's intention to have its New Plan and its New Plan only for all employees.

Respondent was intent on doing what it wanted to do - implement the same health benefits it was offering nonrepresented employees. It waited as long as possible to give notice to the Union concerning its asserted annual review and adjustment of health benefits to jam through its proposal immediately upon the Union's presentation of its counterproposal. Respondent also did not express any willingness to continue to bargain over its announced health benefit changes, even after they were to take effect. Thus, Respondent's unequivocal announcement of implementation on October 25 at the table and October 26, by letter, and its failure to respond to the Union's letter of November 12, stating that the parties should bargain over health benefits, left no opportunity for further discussion of the subject as in *St. Mary's.*

Whatever lead negotiator Brannan's understanding of the law regarding impasse and possible exceptions was, the record evidence made clear that he was willing to, and did, bargain with Respondent over health benefits on an expedited basis and never refused to bargain such an agreement for 2013 alone. What Brannan understood was that Respondent was going to implement what it had proposed unless he bargained over the subject and that it was in the Union's interest to attempt to achieve a better bargain on this subject than Respondent's proposal. The Union came in with a realistic proposal that met Respondent more than halfway, yet the Union's counter generated no interest from Respondent as it was dead-set on implementing its unified offering to all employees, as the Judge properly found.

For all of the above reasons, Respondent violated Section 8(a)(5) by implementing its health benefits proposal without providing the Union with adequate notice and a meaningful opportunity to bargain as the ALJ correctly concluded.

B. The Parties Were Not at a Good Faith Impasse on the Subject of Health Benefits When Respondent Implemented Its Proposal.

While it is clear that Respondent did not afford the Union adequate notice and a meaningful opportunity to bargain, as the Judge properly found, and violated the Act by implementing its health benefits proposals as set forth above, Respondent also excepts to the Judge's failure to reach the issue of whether the parties were required to bargain to impasse in the issue of the health benefits and wellness plan, arguing the parties were at impasse on this issue and excepting to the Judge's failure to so find. Should the Board decide to reach this issue, as to whether impasse on a single subject is required under the *Stone Container* exception to the overall impasse doctrine, it is clear the parties were not at impasse here. In *St. Mary's Hospital,* the Board concluded that because the parties had, in fact, "exhausted all possibilities of reaching agreement over the healthcare issue before the deadline" it did not need to reach the issue of whether the respective employers were "required to negotiate to impasse before implementation." *St. Mary's Hospital,* 346 NLRB at fn. 4 (citing *Saint-Gobain Abrasives*, 343 NLRB 542 (2004) at fn. 3 (adopting the ALJ's finding that the parties were at impasse)).

There is no question that the parties had not exhausted all possibilities to reach agreement on health benefits. Respondent had just received the Union's proposal when Respondent's negotiator Scanlan informed Union negotiator Brannan at the end of the bargaining session, and by letter the next day, that Respondent would implement its proposals on health and wellness. Respondent asked no questions of the Union as to whether it could move in any manner on its counterproposal, and there is no evidence that the parties were at impasse on healthcare benefits.[8] As Brannan testified, this was the Union's opening bid, which provided grounds for the give and take of good faith negotiations, the Union accepting Respondent's proposed framework for health and wellness benefits, and in no way suggesting that there was no room for the Union to

[8] As the Board has long held, impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

move. There is no evidence whatsoever in the record that the Union indicated in any manner that it would not move on its proposal. Respondent, however, was committed only to having its New Plan implemented, rather than engage in bargaining with the Union over the Union's October 25 counterproposal.

Respondent requested that the Union agree to extend the window for enrolling RNs in the wellness program but did not offer to do the same for healthcare benefits, demonstrating that this "deadline" was self-imposed. Sutter Health's Health and Welfare Benefits Manager acknowledged such, testifying that when a contract is reached between a Sutter affiliate and a union, that an adjustment can be made to benefits later by Sutter Health if, for example, a contract is reached in March, even though open enrollment occurred in November of a given year.

As Respondent excepts to the Judges failure to reach whether impasse was required concerning the health and wellness subjects, under these circumstances, where bargaining over healthcare was far from exhausted and the "deadline" over healthcare was illusory in nature, Respondent should have been required to have bargained to a good faith impasse before it could lawfully implement its New Plan. The record makes abundantly clear the parties were not anywhere near impasse on healthcare benefits. The Board should therefore find that Respondent violated the Act on the additional grounds of having implemented its New Plan prior to the parties having reached a good faith impasse on healthcare benefits.

IV. CONCLUSION

For all the foregoing reasons, the Board should overrule Respondent's Exceptions and affirm the ALJ's rulings, findings, credibility determinations and conclusions, and adopt the

recommended order of the ALJ.

In addition, should the Board address whether the parties were required to reach impasse in the light of Respondent's exceptions, the Board should find that good faith impasse was required under these circumstances, and that the parties were not at impasse with regard to health benefits and the wellness plan.

DATED: May 18, 2014

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED (CNA/NNU)
LEGAL DEPARTMENT

Micah Berul
Counsel for Charging Party, CNA/NNU

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, I served a true copy of the following document:

CHARGING PARTY CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS
[Case 32-CA-098549]

via Electronic mail addressed as follows:

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ATTORNEYS FOR RESPONDENT

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: May 22, 2014

Tym Tschneaux